FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT THE CELOTEX CORPORATION

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EXPLANATION OF CITATIONS

Citation	Explanation
— A. —	Supreme Court Appendix (preceded by volume number and followed by page number(s)).
App.Jt.Br. —	Appellants' Joint Brief in the United States Court of Appeals for the Third Circuit, Nos. 75-1836 through 75-1842, which has been reproduced as an Appendix to Respondents' Joint Brief.
App.Jt.Rep.Br. —	Appellants' Joint Reply Brief in the United States Court of Appeals for the Third Circuit, Nos. 75-1836 through 75-1842, which has been reproduced as an Appendix to Respondents' Joint Brief.
C.A.App. —	Appendix in the United States Court of Appeals for the Third Circuit, Nos. 75-1836 through 75-1842, which has been filed in this Court.
Def. Req. Final Instr. —	Defendants' Request for Final Jury Instructions (printed at IV A. 1908-17).
Def. Supp. Req. —	Defendants' Supplemental Requests for Jury Instructions (printed at IV A. 1908-17).
Gov. Exh. —	Government's Trial Exhibits.
Resp. Jt. Br. —	Joint Brief For Respondents in this No. 75-1560.
Tr. —	Transcript of the trial proceedings in *United States* v. *United States Gypsum Co., et al.*, No. 73-347, in the United States District Court for the Western District of Pennsylvania.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT THE CELOTEX CORPORATION[1]

Respondent The Celotex Corporation ("Celotex") joins in the joint brief submitted on behalf of all respondents and adopts the arguments set forth therein. Celotex submits this

[1] Georgia-Pacific Corporation, also a respondent herein, joins in this brief and adopts the arguments set forth herein. Respondent Andrew J. Watt joins in Point II of this brief, relating to the admission of Quayle's hearsay testimony, and adopts the arguments set forth therein.

supplemental brief in support of three additional grounds which provide independent justification for reversal of its conviction but which the Court of Appeals found unnecessary to consider in reaching its decision that the convictions of respondents, including Celotex, should be reversed. Should this Court disagree with the contentions presented in Respondents' Joint Brief, Celotex urges that these issues, together with the other remaining issues argued by all respondents jointly but not decided by the Court of Appeals, should be remanded to the Court of Appeals for its consideration. *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976); *see*, Gov.Br. at 73, n. 68; Resp.Jt.Br. at 2, n.2. If this Court declines such remand, notwithstanding the mutual desires of all parties, Celotex requests that this Court should uphold the reversal of its conviction on the grounds set forth herein.

QUESTIONS PRESENTED

1. Whether the existence of improper outside influences invalidated the jury's verdict, and whether the refusal of the trial court to permit investigation of these prejudicial influences is reversible error.

2. Whether the admission in evidence of purported statements and the Grand Jury testimony of the late Melvin Quayle, in violation of the hearsay rule and Celotex' Sixth Amendment right to confront and cross-examine witnesses against it, is reversible error.

3. Whether the trial court's admission, and the prosecution's use, of irrelevant evidence regarding Celotex' document retention policy is reversible error.

COUNTERSTATEMENT OF THE CASE

Celotex adopts by reference the Counterstatement of the Case included in Respondents' Joint Brief. Those additional

facts that relate specifically to the issues addressed in this supplemental brief are discussed in the appropriate sections of the argument herein.

SUMMARY OF ARGUMENT

1. The verdict of the jury was invalid because (1) improper outside influences were involved in breaking the jury's apparently irresolvable deadlock, (2) the trial judge's instructions to and communications with the jury coerced a verdict, and (3) one or more jurors suffered health problems which impaired their competency to continue jury service. The trial judge had an affirmative duty to ascertain the existence of any alleged improper outside influences affecting the jury's verdict. The trial court's failure to hold an evidentiary hearing or to permit appropriate inquiry by counsel to determine the extent of prejudice from these outside influences is reversible error. *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954), *after remand*, 350 U.S. 377, 379-80 (1956).

2. The trial court improperly permitted the prosecution to rely upon inadmissible and inflammatory hearsay evidence concerning remote incidents without any proof of their connection to the respondents or to later events. This evidence consisted of testimony about out-of-court statements purportedly made by the late Melvin Quayle, to which all respondents objected, and of portions of Quayle's Grand Jury testimony, to which Celotex, Georgia-Pacific and Watt objected. Since this evidence was clearly hearsay, it should not have been admitted against those respondents who had properly objected to it. Moreover, its admission violated the objecting respondents' Sixth Amendment right to confront and cross-examine the witnesses against them. Because this was the only direct evidence suggesting that respondents were engaged in any type of illegal combination, its admission against those who objected

was highly prejudicial. The trial court gave no cautionary instruction to the jury that it should not consider this evidence as to the objecting defendants; even if it had, no such instruction could adequately compensate for denial of their constitutional right of cross-examination. *Bruton* v. *United States*, 391 U.S. 123 (1968).

3. The trial court overruled Celotex' objections to the admission of evidence concerning its document retention policy. Later, the court ruled that such evidence was to be used only to show why certain Celotex documents were not available. Despite this limitation, formulated *sua sponte* by the court, the prosecution repeatedly insinuated that Celotex officials had intentionally destroyed relevant documentary evidence. Any such inference was wholly unsupported by any admitted evidence and the relevance of the retention policy to any issue in the case was never established. The trial court's admission of, and later refusal to strike, this evidence and its refusal to sustain proper objections to the prosecutor's inflammatory and highly prejudicial misuse of it constitute reversible error.

ARGUMENT

I. IMPROPER OUTSIDE INFLUENCES INVALIDATED THE JURY'S VERDICT, AND THE TRIAL COURT'S REFUSAL TO PERMIT INVESTIGATION OF THESE INFLUENCES IS REVERSIBLE ERROR.

For the reasons set forth in Respondents' Joint Brief, Celotex asserts that the trial court's instructions to and communications with the jury, on their face, coerced its verdict. Celotex here contends alternatively that the judge's failure to conduct and refusal to permit an investigation of the nature, extent and effect of both his communications with the jury and of improper outside influences on the jury is of itself reversible error since such factors are presumptively prejudicial.

When there are allegations that a jury was subjected to improper outside influences or other grounds for believing the jury's verdict may be invalid, the trial judge has an affirmative duty to ascertain the true facts of the case, or to permit the parties to do so. *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954), *after remand*, 350 U.S. 377, 379-80 (1956); *Silverthorne* v. *United States*, 400 F.2d 627, 643 (9th Cir. 1968), *after remand*, 430 F.2d 675 (9th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971). Failure to hold an evidentiary hearing or to permit appropriate inquiry by counsel to determine the extent of any possible prejudice is reversible error. *Krause* v. *Rhodes*, No. 76-1095 (6th Cir., filed Sept. 12, 1977); *United States* v. *Chiantese*, 546 F.2d 135, 138 (5th Cir.), *modified on other grounds*, 560 F.2d 1244 (5th Cir. 1977); *Eaton* v. *Wyrick*, 528 F.2d 477, 481 (8th Cir. 1975).

The jury returned its guilty verdict against all respondents on the eighth day of sequestered deliberations. During these deliberations, the jury had twice informed the trial judge that it was deadlocked (IV A. 1835, 1838), the judge had three times administered his version of the so-called "dynamite" or Allen charge (IV A. 1766-67; 1815; 1818) and the court had conferred privately with the jury foreman in the absence of defense counsel (IV A. 1836-40). After his conference with the jury foreman, the trial judge refused to make available to counsel the transcript of that conference (IV A. 1827).

In addition to denying counsel access to the transcript of his private conversation with the jury foreman, immediately after the verdict the trial judge rejected requests of defense counsel to interview the jurors on subjects such as the influence of pretrial publicity and the effect of other extraneous factors in persuading the apparently deadlocked jury to reach a unanimous guilty verdict against all defendants. He even instructed defense counsel that they could not talk to the jurors under any circumstances, even to accept volunteered comments from individual jurors (IV A. 1832-33). Respondents' later motion

for post-trial interview or an *in camera* interrogation of jurors and alternate jurors, and for disclosure of the impounded transcript, was denied by the trial court's Memorandum Opinion of August 14, 1975, two weeks after respondents had filed their notices of appeal (I A. 45, 52-59).

Celotex promptly, on September 4, 1975, filed a motion in the Court of Appeals for Post-Trial Interview or *In Camera* Interrogation of Jurors (*see*, I A. 30c), which was denied, without prejudice, by the Court's order of September 16, 1975, in light of its concurrent order granting respondents' joint motion for disclosure of the impounded transcript of the conversation between the trial judge and the foreman of the jury (IV A. 1835-36). Although the record of the trial and of the judge's and foreman's private conversation amply demonstrates the invalidity of the jury's verdict and is sufficient for its reversal,[2] Celotex continued to urge the Court of Appeals to grant it leave to conduct post-trial interviews of the jurors in an effort to obtain further support for this position.[3] Specifically, the purpose of such interviews was to inquire of the jurors as to the existence of further facts in support of Celotex' assertions that (1) improper outside influences were involved in breaking the jury's apparently irresolvable deadlock, (2) the trial judge's instructions to and communications with the jury coerced a verdict, and (3) one or more jurors suffered health problems which impaired their competency to continue jury service.

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[2] See, Point IV of the Argument in Respondents' Joint Brief.

[3] On October 23, 1975, Celotex filed its Motion for Reconsideration of the Order of September 16, 1975, Denying Celotex' Motion for Post-Trial Interview of Jurors, based on its new Motion for Leave to Conduct Post-Trial Interviews of Jurors filed on October 16, 1975. These two motions were denied by order of the "motion" panel of the Court of Appeals dated October 31, 1975, with leave to file a new motion for the consideration of the "merits" panel. Thereafter, on November 17, 1975, Celotex filed a Renewed Motion for Leave to Conduct Post-Trial Interviews of Jurors (*see*, I A. 30d-e). Celotex also filed a supplemental brief in support of its renewed motion. Respondent Georgia-Pacific joined in that brief and in Celotex' renewed motion, as well as the prior motions for leave to conduct post-trial juror interviews.

Possibly improper outside influences on the jury were reflected by the jurors' contacts with the "doctor downstairs" (IV A. 1837), whatever comments were conveyed to other jurors by the jury foreman concerning his conference with the judge, and the rendition of guilty verdicts after the foreman's statement to the trial judge that no evidence before the jury could break its deadlock (IV A. 1838; *see also*, Resp. Jt. Br. at 72). Private communications between jurors and others are presumptively prejudicial, particularly when, as here, there has been no initial inquiry at all to determine the magnitude of the prejudice. *Remmer* v. *United States*, 350 U.S. 377, 379-80 (1956); *Kennedy* v. *Great Atlantic & Pacific Tea Co.*, 551 F.2d 593, 598 (5th Cir. 1977); *United States* v. *Doe*, 513 F.2d 709, 711 (1st Cir. 1975).

Regarding the physical condition of the jury, Foreman Russell told the court that "at least eight" jurors were taking "some kind of pill," that "one of these jurors at one time I thought she was going to jump out the window," and that several jurors were experiencing "highs and lows" which seemed "induced" (IV A. 1837-38). Regarding the jury's deadlocked status, Russell told the judge that even if the jury were to reach a verdict, he believed it would not be a true verdict (IV A. 1838); the entire jury had earlier reported that it was deadlocked and that if any juror changed his mind, "he would only change due to compassion for his fellow jurors" (IV A. 1835; *see also*, Resp. Jt. Br. at 68-76). These circumstances raised questions about the jury's condition during its deliberations which were certainly sufficient to permit counsel to seek further information through juror interviews.

Appellate courts have held that "[t]he illness of a juror may be regarded as such a circumstance [contributing to a coerced verdict], but only where it appears from the evidence that the verdict was induced by the juror's condition." *United States* v. *Grosso*, 358 F.2d 154, 159-60 (3rd Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968). In the trial below, it was

impossible to determine whether the "verdict was induced by the juror's condition," because the court refused to permit any post-trial contact with individual jurors.

Celotex recognizes that judicial inquiries regarding the internal deliberations of the jury or the mental processes by which any juror reached his verdict are impermissible. *McDonald* v. *Pless*, 238 U.S. 264 (1915); *Mattox* v. *United States*, 146 U.S. 140 (1892); *Government of Virgin Islands* v. *Gereau*, 523 F.2d 140, 149 (3rd Cir. 1975), *cert. denied*, 424 U.S. 917 (1976). But the jury's internal deliberative processes are not at issue here. Based on the transcript of Jury Foreman Russell's conversation with the trial judge, it seems clear that extraneous influences, wholly unrelated to the evidence before the jury, played a part in breaking the seven-day deadlock. What is at issue is whether Celotex should have had an opportunity to seek additional evidence of the existence of such outside influences as further support for its position, in the event this Court should not accept respondents' joint position that on the present record alone the jury's verdict was the result of judicial coercion and may not stand.

Celotex recognizes that in view of the passage of time since the verdict and other factors, it may now be too late for juror interviews to yield a true picture of the facts pertinent to the validity of the verdict. *United States* v. *Thomas*, 463 F.2d 1061, 1065 (7th Cir. 1972). If the memories of the jurors have dimmed, then the failure of the trial court to ascertain the extent of the prejudice resulting from any improper outside influences "makes a new trial imperative." *Mares* v. *United States*, 383 F.2d 805, 809 (10th Cir. 1967), *after remand*, 409 F.2d 1083 (10th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969); *Krause* v. *Rhodes*, No. 76-1095 (6th Cir., filed Sept. 12, 1977).

Decisions of this Court and federal courts of appeals support the propriety and necessity of juror interviews when grounds exist to question the validity of a jury verdict. In

Remmer v. *United States*, 347 U.S. 227, 229-30 (1954), this Court emphasized the necessity for investigation of and a complete record regarding an alleged out-of-court communication with the jury foreman:

> "We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless .... The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial ..."

When, on remand, the district court interpreted too narrowly this Court's mandate to investigate allegations of improper juror conduct, the Court remonstrated:

> "We sent the case back to the District Court with directions to hold a hearing, with the petitioner and counsel present, to determine from the facts whether or not communication with the juror by the outsider and the events that followed were prejudicial and, therefore, harmful to the petitioner, and, if so, to grant a new trial ...
>
> "The District Court's limit of our mandate, it seems to us, is hardly warranted by the language of the opinion, ... It was our intention that the entire picture should be explored ... We also pointed out that the record we had before us did not reflect what in fact transpired, 'or whether the incidents that may have occurred were harmful or harmless.' *Ibid.* It was the paucity of information relating to the entire situation coupled with the presumption [of prejudice] which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing." *Remmer* v. *United States*, 350 U.S. 377, 378-80 (1956).

In re Sawyer, 360 U.S. 622, 637-38 (1959), approved post-trial interviews of jurors by counsel where the question of the competency of jurors was raised. And in *Parker* v. *Gladden*, 385 U.S. 363 (1966), this Court approved independent in-

vestigation of the jury's verdict conducted by the wife of the defendant two years after his conviction, a situation in which the protection provided by ethical limitations applicable to attorneys was not even present.

Federal courts of appeals have likewise permitted post-trial juror investigations as a necessary incident to the responsibility to guarantee the integrity of jury verdicts. *Paramount Film Distrib. Corp.* v. *Applebaum*, 217 F.2d 100, 104-22 (5th Cir. 1954). The Court of Appeals for the Fourth Circuit has observed,

> "Of course, a juror may after verdict be queried as to information, whether documentary or oral in nature, introduced into the jury room but not put before them at trial. Similarly, the intrusion of a stranger, or the misconduct of a juror, during deliberation is open to such inquiry." *Rees* v. *Peyton*, 341 F.2d 859, 865 (4th Cir. 1965).

Rule 606(b), Federal Rules of Evidence, also clearly assumes the propriety of a judicial "inquiry into the validity of a verdict . . ." The Rule goes on to codify prior case law regarding prohibited subjects of such inquiries. Significantly, however, it provides that the court may consider a juror's testimony, his affidavit, or evidence of any statement made by him,

> " . . . on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror."

Similarly, the American Bar Association's Code of Professional Responsibility emphasizes that a lawyer's duty to represent his client zealously within the bounds of the law requires that he have access to jurors after conclusion of the trial:

> "After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases.

> *Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of the verdict might go undetected.*" ABA Code of Professional Responsibility, Canon 7, Ethical Consideration 7-29. (Emphasis supplied; footnotes omitted)

Moreover, the importance of the information sought is underscored by recent decisions on the invalidity of verdicts which are coerced by improper judicial instructions or communication with the jury. *See, e.g., Rogers* v. *United States*, 422 U.S. 35, 40 (1975); *Parker* v. *Gladden*, 385 U.S. 363 (1963); *Jenkins* v. *United States*, 380 U.S. 445 (1965). Other cases leave little doubt that the incompetence of one or more jurors—such as through mental disability arising from taking drugs—is adequate ground to overturn the jury's verdict. *Government of Virgin Islands* v. *Gereau*, 523 F.2d 140, 150 (3rd Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); *United States* v. *Dioguardi*, 492 F.2d 70, 79 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974).[4] As Justice Brennan, speaking for the majority, said in *In re Sawyer*, 360 U.S. 622, 637 (1959):

> "While there is clearly some delicacy involved in approaching a juror who has become mentally unsettled, *evidence that a juror was incompetent at the time of the rendition of the verdict might be admissible to impeach a verdict* where evidence of the jury's mental and reasoning processes is not." (Emphasis supplied)

The circumstances under which the jury below returned its verdict deprived this respondent of its Sixth Amendment rights to an impartial jury, to confront and cross-examine witnesses and to assistance of counsel. U.S. CONST. amend. VI; *Parker* v. *Gladden*, 385 U.S. 363 (1966); *United States* v. *Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972); *United States* v. *McKinney*, 429 F.2d 1019, 1022-23 (5th Cir. 1970). Even though in its

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[4] 28 U.S.C. § 1865(b)(4) disqualifies from jury service any person who "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service."

view the present record adequately supports these contentions. Celotex should have been permitted to seek further support for them by interviewing the jurors. Not only the cases and ethical considerations referred to above, but also the right to free speech protected by the First Amendment to the Constitution of the United States, dictate that such relief should have been ordered. *Cf. Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The trial court's failure to permit Celotex to investigate the presumptively prejudicial outside influences on the jury, and the very existence of such influences, fully support the reversal by the Court of Appeals of Celotex' conviction.

II. ADMISSION IN EVIDENCE OF PURPORTED STATEMENTS AND GRAND JURY TESTIMONY OF THE LATE MELVIN QUAYLE, IN VIOLATION OF THE HEARSAY RULE AND CELOTEX' SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES AGAINST IT, WAS PREJUDICIAL AND REVERSIBLE ERROR.

The only evidence in the record directly suggesting that respondents were engaged in any type of illegal combination consisted of inadmissible hearsay improperly admitted over the objections of respondents Celotex, Georgia-Pacific and Watt. Admission of this highly prejudicial testimony violated both the hearsay rule and Celotex' rights under the Sixth Amendment, thereby necessitating reversal of its conviciton. U.S. CONST. amend. VI; *Pointer* v. *Texas*, 380 U.S. 400, 408 (1965).

The prosecution sought to prove and later argued to the jury that respondents conspired beginning in 1960 to drive Texas Gypsum Company, a new single plant producer, out of business (IV A. 1625). According to the prosecution, respondents sought to prevent Texas Gypsum from continuing to use special trucking services and rates to undersell its competitors (IV A. 1626).

On direct examination, prosecution witness Claude Huckleberry of Texas Gypsum was permitted to testify, over objection

by all respondents on the ground of hearsay,[5] about a visit to him in early 1961 by the late Melvin Quayle, then an employee of American Gypsum Company, a small gypsum manufacturer in Albuquerque. According to Huckleberry, Quayle had said during his visit:

> "Okay, I will get right down to what I came here for. All the big boys have been on the telephone trying to get me to come down here and see if there wasn't some way that we could straighten this thing out before anyone moved against Texas Gypsum" (I A. 295).

As the trial court recognized (I A. 292), this testimony was strictly hearsay; for the reasons discussed below, it did not fall within the co-conspirator exception to the hearsay rule and, therefore, should have been stricken.

Since the prosecution was attempting to portray Quayle's visit as evidence of concerted, conspiratorial activity by respondents, the critical issue was whether Quayle had, in fact, visited Huckleberry as an emissary of "the big boys." During his Grand Jury appearance, Quayle had testified unequivocally to the contrary on this subject:

> "Question: And it [the visit to Huckleberry] was done with the knowledge and blessings of your major competitors; was it not?
>
> "Answer: No, I did not say that.
>
> "Question: Is it not a fact that it was done with the knowledge and blessings, the acquiescence of the major competitors?
>
> "Answer: No, I deny that. We have [sic] nothing to do with any trip there or what I said to him or anything else . . .

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[5] Respondents had a continuing objection to any hearsay improperly admitted under the co-conspirator exception to the hearsay rule (I A. 110-11). Prior to Huckleberry's testimony about Quayle, defense counsel objected to the admissibility of this evidence (I A. 290-92). Respondents' later motions to strike this testimony were denied (II A. 1006; IV A. 1608).

"I was not an emissary except for my own company" (Grand Jury Tr. at 2429, 2443; I A. 312).

In denying respondents' objections to the Huckleberry testimony, the trial judge—supposedly to permit respondents to rebut Huckleberry's statement that Quayle had visited him as an emissary of the "big boys"—suggested that those portions of Quayle's Grand Jury testimony bearing on this narrow issue be read to the jury (I A. 293), since Quayle himself was deceased and not available as a rebuttal witness. In response to this suggestion, the prosecution, on grounds of "fairness," insisted that large portions of Quayle's Grand Jury testimony, all clearly further hearsay, regarding the attitude of major gypsum manufacturers toward Huckleberry's truck delivery policies also be read to the jury (I A. 295-96). Respondents, finding most of the prosecution's requested testimony irrelevant, far outside the statute of limitations period, and barred by the hearsay rule, then reduced their request for reading of Quayle's Grand Jury testimony to the one line, "I was not an emissary except for my own company" (I A. 297).

When the trial judge ruled that in return for the reading of this one line he would permit many pages of Quayle's Grand Jury testimony designated by the prosecution to be read, counsel for Celotex, Georgia-Pacific, and Watt objected to the admission of *any* of Quayle's testimony designated by any party on the grounds that all of it was both hearsay and irrelevant (I A. 300-03). Despite these objections, the trial judge insisted on having that testimony read "out of essential fairness" (I A. 304).[6] The testimony was admitted despite the judge's express recognition that "there isn't any question that it is hearsay. No question about it. There is no question now that none of you men are going to have the opportunity to cross-examine any further on this matter" (I A. 304).

[6] The "fairness" of the court's decision can be judged from the fact that the reading requested by the prosecution took fourteen pages of trial transcript to complete (I A. 305-12), although it had been designated in response to *certain* respondents' request for the reading of only ten words.

At least three portions of the Quayle Grand Jury testimony designated by the prosecution and read, over objection, to the jury were severely prejudicial to respondents. At one point before the Grand Jury, Quayle conceded that he had told Huckleberry "the big boys . . . want you to stop this job site trucking" (I A. 307). This clearly implied that he was speaking for other gypsum companies.[7] Next, the prosecution caused to be read Quayle's Grand Jury statement that he had told Don Miller of Celotex, Bud Storey of The Flintkote Company, John Brown of National Gypsum and Al Meyer of Georgia-Pacific that Quayle's conversation with Huckleberry had been tape recorded (I A. 311). This statement had obvious value to the prosecution in implying that Quayle was "reporting back" to "the big boys" about his mission to Huckleberry. It was particularly prejudicial to Celotex because Miller at the time of the trial also was dead, and of course Celotex could not rebut the statement or its implication. Finally, in a third excerpt from his Grand Jury testimony read to the jury, Quayle admitted that it was "probably true" that "the big boys" had wanted Huckleberry to stop job site truck deliveries, as he had told Huckleberry (I A. 311-12), even though at the time he said it Quayle had never been told this by any other gypsum manufacturer (I A. 309-10).

The effect of admitting this conceded hearsay testimony was to place before the jury statements which strongly *implied* that Quayle had visited Huckleberry as an emissary of some of the respondents. These statements had been made by Quayle with no opportunity for cross-examination to demonstrate that there had actually been no contact whatsoever with any respondent before the visit to Huckleberry, and under circumstances, viz., Quayle's death, which prevented any effective rebuttal of the false implications conveyed by the testimony.

[7] Later in his Grand Jury testimony, Quayle stated that this comment to Huckleberry was only "puff talk," and was not based on any actual conversation with other gypsum manufacturers (I A. 307-08).

Moreover, because of the death of Miller, Celotex was especially prejudiced by being totally unable to rebut the incriminating implications of Quayle's hearsay testimony.

Coming as it did early in the presentation of the prosecution's case, Quayle's clearly inadmissible hearsay testimony, which could not be effectively rebutted by Celotex, tended to supply a critical "missing link" in the prosecution's otherwise unsubstantiated theory of concerted predatory action by Celotex and other respondents against Texas Gypsum. Admission of this testimony both contravened the hearsay rule and violated Celotex' Sixth Amendment rights to confront and cross-examine witnesses against it.

By the trial judge's own admission, both Quayle's out-of-court statements purportedly made to Huckleberry and his Grand Jury testimony were unquestionably hearsay (1 A. 292, 304). The Huckleberry-Quayle hearsay testimony of their 1961 meeting was particularly damaging since it was the only evidence directly suggesting that respondents were engaged in any type of illegal combination. These statements were not properly admitted as co-conspirator declarations because there was no substantial independent evidence to connect Quayle to any alleged conspiracy involving respondents. *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963); *United States* v. *Rodrigues*, 491 F.2d 663, 666 (3rd Cir. 1974); *United States* v. *DeCavalcante*, 440 F.2d 1264, 1272 (3rd Cir. 1971).

The only evidence *aliunde* which supposedly "connects" Quayle to respondents' alleged conspiracy consists *solely* of the membership of American Gypsum, Quayle's employer, in the Gypsum Association and occasional Robinson-Patman verification.[8] But the prosecution cited *no* evidence *aliunde* that in

[8] The prosecution was allowed to argue from Quayle's Grand Jury testimony that he reported to other competitors that Huckleberry

(Footnote continued on next page.)

1960 the Gypsum Association had any common plan to eliminate the trucking services of Texas Gypsum or that Quayle was part of such a plan. The only independent "evidence" at the time of those declarations is thus based purely on "guilt by association," a concept frequently and routinely rejected by the cases. *See, e.g., United States* v. *Basurto*, 497 F.2d 781, 793 (9th Cir. 1974); *United States* v. *Van de Carr*, 343 F.Supp. 993, 1001 (C.D. Cal. 1972). In view of the inflammatory nature of these hearsay statements regarding "the big boys" killing the "little" producers, failure properly to connect the declarations was clearly prejudicial.[9]

The trial court's admission, over objection, of Huckleberry's hearsay testimony is reversible error as to all respondents. *See*, App.Jt.Br. at 86-90, 123-25; App.Jt.Rep.Br. at 46-47. In an apparent attempt to offset the prejudice resulting from Huckleberry's testimony, the court compounded its error as to Celotex, Georgia-Pacific and Watt by permitting the reading of Quayle's stale Grand Jury testimony to the jury over their vigorous objections (1 A. 300-303). In light of these objections, consent by other co-defendants could not justify admission of that hearsay testimony, certainly not as against respondents who had properly objected to it.

Even less could consent from co-defendants whose counsel felt Quayle's testimony might be "exculpatory" waive the constitutional right to cross-examination of a non-consenting defendant. That right is upheld in *Bruton* v. *United States*, 391 U.S. 123 (1968), wherein this Court reviewed its decisions on

(Footnote continued from preceding page.)

had tape recorded their conversation (IV A. 1626-27). Since this testimony was hearsay and therefore was not evidence *alliunde*, it provided no proper basis for connecting Quayle to any conspiracy. Permitting the prosecution to argue in this manner was grossly unfair. *United States* v. *DeCavalcante*, 440 F.2d 1264, 1272-73 (3rd Cir. 1971).

[9] In the final charge, the trial court failed to include any reference to the requirement that there must be independent evidence to connect any out-of-court statement to any alleged conspiracy involving respondents (IV A. 1729-30). Respondents' request that such a charge be given was denied (Def. Supp. Req. 4, IV A. 1910-11).

requirements of the Sixth Amendment's confrontation clause. The Court there observed that in *Pointer* v. *Texas*, 380 U.S. 400, 404, 406-07 (1965), "we confirmed 'that the right of cross-examination is included in the right of an accused in a criminal case to confront the witness against him' secured by the Sixth Amendment, . . . [and that] 'a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witness against him.'" 391 U.S. at 126.

In *Bruton* the Court extensively reconsidered the rule announced in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), that a co-defendant's confession could be admitted in a joint trial if an adequate cautionary instruction was given against considering the confession's inculpating effect on the declarant's co-defendant. *Bruton* overruled *Delli Paoli* on the ground that admission of "inadmissible hearsay evidence inculpating [the defendant]" posed "a substantial threat to [his] right to confront the witnesses against him." 391 U.S. at 137. The Court emphasized that,

> "We cannot accept limiting instructions as an adequate substitute for petitioner's *constitutional right of cross-examination.* The effect is the same as if there had been no instruction at all." *Id.* (Emphasis supplied)

In the trial below also, the objecting respondents' "constitutional right of cross-examination" was violated. Despite the judge's recognition that "there was no counsel present for any of the defendants at that time [when Quayle testified before the Grand Jury], there was no ability at that time therefore to cross-examine Mr. Quayle by anyone," the jury was permitted to consider Quayle's inculpating testimony. That testimony was essential to the prosecution's attempt to tie Quayle's Huckleberry visit to respondents' alleged conspiracy to put Texas Gypsum out of business, fourteen years before the trial. The importance of this stale hearsay evidence is proven by the fact that the prosecutor referred to and relied upon it in

his closing argument to the jury to establish the critical missing link between Quayle's visit and the respondents (IV A. 1626). In that closing statement, moreover, the prosecutor referred to Quayle's hearsay report of discussions with Don Miller, a deceased former Celotex employee, who was also unavailable to rebut the incriminating implications of Quayle's Grand Jury testimony (IV A. 1627). Thus, Celotex was doubly prejudiced by admission of Quayle's Grand Jury testimony.

The trial judge did not give a cautionary instruction to the jury not to consider Quayle's testimony as to the objecting defendants. Even if he had, "*Bruton* clearly holds that such an instruction in a joint trial is not 'an adequate substitute for petitioner's constitutional rights of cross-examination'." *United States* v. *Cook*, 530 F.2d 145, 151 (7th Cir.), *cert. denied*, 426 U.S. 909 (1976). Although reversible error was committed as to all respondents by the admission of Huckleberry's hearsay testimony, the critical importance of Quayle's Grand Jury testimony to the prosecution's case and the clear impropriety of admitting it as against respondents who objected to its admission provide independent support for reversal of Celotex', Georgia-Pacific's and Watt's convictions. *Bruton* v. *United States*, *supra*; *United States* v. *Cook*, *supra*; *United States* v. *Gonzalez*, 555 F.2d 308, 316-17 (2d Cir. 1977).

III. THE TRIAL COURT'S ERRONEOUS ADMISSION, AND THE PROSECUTION'S IMPROPER USE, OF IRRELEVANT EVIDENCE OF CELOTEX' DOCUMENT RETENTION POLICY WAS HIGHLY PREJUDICIAL AND REVERSIBLE ERROR.

The trial court improperly admitted evidence of Celotex' document retention policy for the limited purpose, devised *sua sponte*, of explaining the unavailability of certain documents—a matter not at issue. Moreover, the prosecution was permitted to misuse this irrelevant evidence in a highly prejudicial fashion. A trial judge has the duty to exclude evidence which is not relevant. Rule 402, Federal Rules of Evidence; *United States* v.

Gorman, 393 F.2d 209, 212 (7th Cir. 1968), *cert. denied*, 393 U.S. 832 (1968), *reh. denied*, 395 U.S. 917 (1969); *United States* v. *Maryland and Virginia Milk Producers' Ass'n.*, 20 F.R.D. 441, 442 (D.D.C. 1957). The failure of the court to exclude this evidence and to prevent its misuse constitutes reversible error.

During a pre-trial evidentiary hearing, Celotex presented the Affidavit of Phyllis Soloman to authenticate certain internal Celotex memoranda ("Soloman Affidavit Exhibits") establishing a two-year retention period for most Celotex files, with a longer four-year period only for "data relating to prices, quotes, and bids to customers as it relates to specific jobs or . . . supports information on 350 or 360 forms . . ." Soloman Affidavit, Exhibit A, p. 1 (Gov.Exh. 2124; C.A.App. 1690ex). The issue in dispute at the pre-trial hearing was the prejudice to respondents, such as through the loss of documents, resulting from the Government's excessive delay in bringing the indictment. Since that issue was never submitted to the jury, admission of such evidence at the pre-trial hearing provided no precedent for its admission at trial.

The trial court, however, improperly admitted into evidence, over Celotex' objection, Soloman Affidavit Exhibits A through E (II A. 735; Gov.Exh. 2124A; C.A.App. 1690ex-1698ex), allowed three of Celotex' former employees, over objection, to be examined about them, refused motions to strike these exhibits and testimony from the record, and permitted the prosecutor in his closing argument, over objection, to urge the jury to draw wholly unsupported and highly inflammatory inferences from this evidence. All of these errors seriously prejudiced Celotex in the eyes of the jury.

The prosecution's first attempt to misuse Celotex' document retention policy came during the direct examination of government witness Warren Hill, a former Celotex employee who had left the company in 1967 (II A. 726-28). Hill testified that he remembered nothing about Celotex' document retention

policy (II A. 727), and that examination of memoranda attached to the Soloman Affidavit did not refresh his recollection on the subject (II A. 727-28). During the course of Hill's questioning, counsel for Celotex objected to the Government's offer of the Soloman Affidavit and exhibits into evidence on the grounds that absolutely no showing of relevance had been made to any issue involved in the trial. When the prosecution failed to establish any foundation for admission of the Soloman documents, the court refused to admit them and the Government withdrew its offer (II A. 727-28).

The prosecution's true purpose in questioning Hill about Celotex' document retention policy is clear from this exchange which included a veiled reference to private, civil antitrust litigation on the West Coast in which Celotex was not even a defendant in 1967 and which the judge had previously cautioned the prosecution not to refer to:[10]

> "By Mr. Fricano: Having seen this document [Gov.Exh. 2124], now, and I realize you didn't read it in its entirety, did it refresh your recollection at all, sir, with respect to the destruction of documents at Celotex at or about January, 1967?
>
> "A. No, I have no recollection of that incident.
>
> "Q. Do you have any recollection of anything, any west coast problems in January of 1967?
>
> "A. No.
>
> "Q. I can't characterize it any further than that.
>
> "A. The answer is no" (II A. 728).

The prosecutor's obvious effort to tie destruction of Celotex documents to West Coast antitrust litigation involving Celotex' competitors had failed, but the subject had been improperly brought to the jury's attention. This occurred despite the fact

[10] Affidavit of William A. Montgomery, filed May 16, 1975, *see*, I A. 20; II A. 652.

that the Soloman Affidavit and the attached memoranda had not even been admitted in evidence.

Notwithstanding its earlier failure to establish the relevance of evidence on Celotex' document retention policies, the prosecution tried again later the same day during its direct examination of retired Celotex employee Marshall Goddard. Despite Goddard's testimony that he did not recall ever seeing Gov.Exh. 2124A (the Soloman Affidavit Exhibits), the Government moved for its admission into evidence (II A. 734). Over the objection of Celotex' counsel, Exhibits A through E to the Soloman Affidavit were at this point admitted into evidence, although the prosecution conceded that most of those exhibits "have not yet been identified by the witness" (II A. 735). The court stated no reason for admitting the documents when their relevance had not been shown.

The Government's examination of Goddard regarding Gov.Exh. 2124A, which consisted of having Goddard simply read what was in the documents since he had no knowledge or recollection regarding them, again demonstrated the improper prosecutorial purpose for their introduction:

> "By Mr. Thorson: Mr. Goddard, could you look at Exhibit 2124A again, please? And I will ask you whether this document established a procedure for retaining certain documents and allowing for the destruction of certain documents within Celotex.
>
> "A. Frankly, I can't answer that fully, because the question of file maintenance was under the office management . . . and I am, frankly, personally not acquainted with what our retention records were. I haven't read this in detail as yet.
>
> . . .
>
> "Q. Were you one of the addressees of this document?
>
> "A. I received a copy of it; yes.

> "Q. And the date of this document is January 11, 1967; is it not?
>
> "A. That is correct.
>
> "Q. And is that on or about the time that Celotex and other gypsum companies began experiencing problems on the west coast?
>
> "Mr. Montgomery: Objection.
>
> "The Witness: I don't know about that.
>
> "By Mr. Thorson: You have no knowledge of that?
>
> "A. I don't know what problems on the west coast means" (II A. 735-36).

Having utterly failed to establish any connection between document destruction and the West Coast litigation, the Government next attempted to demonstrate that destruction of certain documents had been carried out in a manner inconsistent with Celotex' stated policy (II A. 737-740).[11] In response to Goddard's testimony that he did not recognize any of the documents in Gov.Exh. 2124A, the prosecutor proceeded to read selectively to the jury from the exhibit. This was followed by an attempt to have Goddard "deduce" from the dates of certain document destruction authorizations that the destruction was inconsistent with an alleged four-year retention policy.

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[11] Any fair reading of the documents shows on their face that Celotex' stated policy had been followed. The Government cited nothing at trial to prove that the eleven cartons of 1966-68 documents shown as destroyed in 1970 (C.A.App. 1698ex) were within the narrow category required to be kept for four years. They are described on the exhibit simply as "Corr." (C.A.App. 1698ex) presumably meaning correspondence. Conversely, the uncontradicted evidence affirmatively shows that the documents which *were* to be retained for four years were still being retained by Celotex at the time of trial for as far back as 1965 (II A. 744; III A. 1303-04). Many of such documents dating back at least to 1965 were introduced by the Government itself as trial exhibits. *See, e.g.*, Gov.Exh.240a-b, 241c, 243a and 245a-b; C.A.App. 281ex-82ex, 288ex, 290ex and 292ex-93ex.

After this unwarranted prosecutorial "testimony" had continued over objection for almost six full transcript pages, it was finally terminated by the following colloquy:

> "By Mr. Thorson: Now, referring back to the last page, if you would, Mr. Goddard, the last sheet which is the destruction authorization dated February 4, 1970, it states, does it not, that destruction of correspondence was carried out, seven cartons of it, for the years 1967 and 1968, which were not only within four years, but 1968 was within two years—
>
> "Mr. Montgomery: Objection.
>
> "By Mr. Thorson: —of the destruction date; is that not true?
>
> "Mr. Montgomery: Objection. The witness stated he does not know about these documents, and that has previously been read to the jury.
>
> "The Court: Do you know anything about that?
>
> "The Witness: No, sir. This was in a separate department" (II A. 740).[12]

Because of the highly inflammatory nature of the prosecution's repeated insinuation that Celotex officials had intentionally destroyed relevant documentary evidence, respondents' attorneys twice moved the court to strike from the record all of the evidence—consisting mostly of prosecutorial reading of documents never demonstrated to be relevant—relating to Celotex' document retention policies.[13] Both motions to strike

[12] Celotex' document retention policy was also raised by the prosecution during cross-examination of still another former Celotex employee, Richard H. Thompson (III A. 1285-86).

[13] Defendants' Motions to strike Certain Evidence as filed on May 7, 1975, and June 27, 1975; *see*, I A. 19, 22. Celotex also filed the Affidavit of William A. Montgomery, an attorney for Celotex, demonstrating (1) that Celotex had not been sued in any West Coast litigation until long after the date of the January 11, 1967 memorandum establishing Celotex' document retention policy, and (2) that since the first Grand Jury subpoena received by Celotex was not served until November 2, 1971, the timing of the Government's

(Footnote continued on next page.)

were denied by the court without explanation (II A. 885; IV A. 1608), although no showing had ever been made of the relevance or materiality of this evidence, and despite its highly inflammatory and prejudicial nature.

On June 3, prior to the presentation of its affirmative defense, Celotex moved the court for entry of an order specifying the instructions which would be given to the jury regarding evidence of Celotex document retention policies, along with a proposed instruction on that subject.[14] The reason for this motion was the difficulty of presenting a rebuttal to the Government's repeated insinuations about intentional document destruction without knowing the nature of instructions the court would give the jury on this subject. The court refused to specify the language he would use in his instructions[15] (III A. 1110).

The prosecutor's final and most flagrant misuse of the improperly admitted evidence on document retention came in his closing argument to the jury. Prior to that argument, the court had indicated *sua sponte* to counsel that it would admit document retention evidence only for the limited purpose of explaining the absence of any documents which were unaccounted for (Tr. 10,038). Having failed in their efforts to have this evidence stricken, respondents submitted a request for instruction which read in relevant part:

(Footnote continued from preceding page.)

criminal investigation provided no basis for inferring that documents had been destroyed other than in Celotex' regular course of business (Affidavit of William A. Montgomery, filed May 16, 1975; *see*, I A. 20).

[14] Motion of the Celotex Corporation For an Order Specifying Jury Instructions to be Given on Document Retention by Celotex, filed June 3, 1975; *see*, I A. 21.

[15] After the trial judge's refusal to indicate the specific language with which he intended to instruct the jury regarding document retention policy evidence, Celotex continued to maintain the irrelevance of *any* such evidence and introduced no evidence on this subject during its defense.

"The evidence you have heard concerning the file retention policy and practice of Celotex was admitted solely and only for the purpose of explaining why certain documents were not available, if they were not available . . .

". . . There is no evidence that Celotex disposed of any documents pursuant to any alleged price-fixing conspiracy. I instruct you not to reach any conclusion which is unfavorable to Celotex, or to any other defendant, based on the evidence that Celotex disposed of certain documents"[16] (Def. Req. Final Instr. 60; IV A. 1874).

On June 27, three days before the prosecutor began his closing argument to the jury, the trial judge informed all counsel, including the prosecutor, that he would give Defendants' Requested Final Instruction 60 in substance (IV A. 1610).

Despite this clear instruction, communicated to all counsel, that any use of document retention evidence for purposes adverse to Celotex was improper, the prosecutor during his closing argument strongly urged the jury to draw a conclusion adverse to Celotex because of the absence of certain attachments to Gov.Exh. 632, a 1966 memorandum from the late Don Miller of Celotex to Goddard, on the subject of job price protection. The "only explanation" for the absence of the attachments, the prosecutor told the jury, "is that in 1969 Don Miller destroyed boxes and boxes of correspondence. You draw you own conclusion" (IV A. 1637-38).

This wholly improper suggestion was immediately objected to by Celotex counsel. The prosecutor's response to that

[16] The first paragraph of this instruction was requested in compliance with the erroneous rationale the trial judge had given for admission of such evidence. In his final charge to the jury, the judge included substantially the requested instruction (IV A. 1706-07), notwithstanding his earlier refusal to strike the irrelevant document retention evidence and his overruling of Celotex' objection to the prosecutor's improper reference to it in closing argument. This instruction did not and could not have cured the serious prejudice to Celotex from the erroneous admission of this evidence and the prosecutor's improper use of it.

objection[17] totally misconstrued—or misrepresented—the purpose for which the court had said document destruction evidence could be considered. Such evidence could be considered, the court's instruction held, only to show that Celotex' document retention policy was the reason certain documents were not available. From this, the prosecutor argued that such evidence supports an inference of intentional and unlawful destruction of relevant evidentiary documents—the exact opposite purpose.

Despite the inconsistency of the court's rationale for permitting jury consideration of document destruction evidence and the prosecutor's obvious purpose in referring to it in closing argument, the court overruled Celotex' objection. This ruling could only have suggested to the jury that it should do precisely what the prosecutor had urged it to do: infer an unlawful coverup as the reason for the absence of certain Celotex documents.

In summary, the prosecution completely failed to demonstrate any legitimate purpose for admission of evidence about Celotex' document retention policy. Nevertheless, that evidence was admitted, despite its patent irrelevance to any issue properly submitted to the jury. Later, the trial court improperly refused repeated requests to strike such evidence from the record. Finally, the prosecutor in closing argument made the inflammatory and highly prejudicial suggestion that the jury consider such evidence for a purpose clearly prohibited by the court's own instruction on the subject, and the court failed to countermand that improper suggestion by sustaining Celotex'

[17] After the prosecutor's "you draw your own conclusion" statement, the following colloquy occurred:

"Mr. McSweeney: I object to that in light of what the Court has said he would instruct on.

"Mr. Fricano: I believe the Court instructed that we could only argue the point to show that there are certain documents missing, and that's exactly what I said.

"The Court: Objection will be overruled" (IV A. 1638).

objection to the prosecutor's comment. All of these facts support the Court of Appeals' decision reversing the conviction of Celotex.

CONCLUSION

The issues raised in this supplemental brief need be considered only if this Court does not grant the relief sought in Respondents' Joint Brief. In that event, Celotex joins with the other parties in urging that the cause be remanded to the Court of Appeals for its consideration, in the first instance, of the issues raised herein, together with the other issues argued jointly by respondents but not previously decided by the Court of Appeals. Should this Court nevertheless decline such a remand, it should affirm the reversal of the conviction of Celotex on the basis of the errors asserted in this supplemental brief.

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February 10, 1978

Respectfully submitted,

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